2-04 MO Essay 1 - Example 1

1). Bigshot Owner (BO) can sue Corporation (C) in C's name for defective workmenship.

At issue is whether the Certificate of Dissolution filed by the Secretary of State on July 31, 2003 could prevent BO from suing C in its capacity as a C, and conversely if C can sue on a contract created since the C had already been dissolved.

In MO, the rule is that a third party (3P) to a contract with a C is estopped from cliaming the C did not exist at the time the contract (K) was created if the 3P believed that he was dealing with a C. If the C held itself out to be a C, contracted in the name of the C, the 3P had no notice that the C did not actually exist and the 3P acted and relied on the fact that he was dealing with a C. The C is estopped from claiming that it was not a C to avoid liability in a contract.

In this case, Joe, the director and sole SH of C had notice on July 31, 2003, that his C had been dissolved by MO under a quo warranto proceeding. However, Joe continued on acting as if the C still existed by accepting and signing a K on Aug. 10, 2004 with BO. In the case of involuntary dissolution, that can be triggered by the state, as in this case, the C may not start any new buisness, but only finish existing buisness. Here, Joe began new buisness by agreeing to a new K and held himself out as a C to BO. When BO relied on the fact that he was dealing with a C and had no notice that the C had been dissolved this would estopp the parties from cliaming no C existed to avoid liablilty on the K.

Here, BO can sue C in C's name. Even though the C has been dissolved, the directors, of a C still remain liable in thier director capacity, although not personally, to judgments in the C's name. Here, Joe, as the director of C, will be liable to BO if a judgment results in BO's favor. Joe will have to use the C's funds that were transferred to him upon dissolution in his director capacity (to hold and disperes C funds left appropiately to the creditors of the C)

C can also sue BO in the C name for nonpayment by BO since BO as a 3P is now estopped from cliaming C did not exist. BO signed a K with C, paid money to the C, and accepted work from C. Bo had no notice that C did not exist at the time, and therefore will be estopped from claiming otherwise.

2). Joe is personally libale to BO for the C's defective work, not because the C did not exist, but because Joe contracted with BO after the dissolution was effective on July 31, 2003.

The rule in MO is that directors can be personally liable for K's enterd into after dissloution of the C. If the K was not necessary to

wrap up existing buisness, the directors can not authorize or agree to new work on the C's behalf.

In this case, Joe did start a new K and he had notice that the C was dissolveing when he was notified on April, 2003. Joe will be persoanlly liable in his capacity as director for agreeing to the K after the C was dissolved.

3). C could have legally entered in the K with BO before dissolution was effective and not be personally liable on the K.
The issue is when a director of a C becomes personally libable on a K before dissolution.

The rule is that directors are not personally liable on a K entered into with a 3P if done in good faith prior to dissolution.

Here, Joe had notice in April that the C would be dissolving. It can be argued that Joe acted in bad faith by agreeing to a new K when he knew dissolution was probable since Joe had not takne any steps to prevent dissolution. So, Joe could have legally enterd into the K w/ BO, but may have acted in bad faith so may still be personally liable.

4). BO can satisify thier judgment from money that Joe transferred to himself.

At issue is what rights do outside creditors have against asset/money transferred to SH upon dissolution.

The rule is that upon dissolution, the director is responsible for paying all debts of the C before dispersing any money to the SH or other directors of the C. If money is transferred before the debts are paid, the creditor has the right to recliam the money transferred upon dissolution to satisify thier cliam/debt owed by the C.

Here, Joe in his capictiy as director, transferred money to himslef as a SH and as a director. The debt to BO was not paid first and should have been. Bo can take the assets Joe transferred to satisify thier debt.

5.)If C wanted to liquidate it needed to file notice of liquidation with Mo sect. of state, and give written notice to all creditors in addition to publication of liquidation to the rest of the world.

Here, Joe needed to give BO specifc written notice that he was liquidating, file with SOS and publish his liquidation in a cirrculated newspaper or such in order to liquidate.

2-04 MO Essay 1 - Example 2

1. Big Shot Owner may sue Corp in Corp's name for the claim of defective workmanship based on a theory of Corporation by Estoppel. The claim is a contract-based claim for which Corp by Estoppel applies to prevent Corp. from avoiding liability when it has held itself out as a corporation to a third party without notice. After dissolution, Corp signed and performed the contract as a corp. and should be estoppel from denying corp status.

However, Corp has no power to sue in its own name after dissolution for nonpayment of a contract executed after dissolution. Although the Corp may wind-up its affairs and perform existing contracts, it has no power to enter into new contracts or sue thereon. Joe, however, may have an action.

2. Joe is personally liable to Big Shot Owner for Corp's defective work because he authorized an ultra vires act by the Corp – an act without authority. In addition, he exceeded authority in winding-up affairs and is personally liable therefore.

3. My answer to 2 would change if Corp had entered into the contract before the effective date of the Cert of Dissolution. Cert of Diss effective when filed by Sec. of State. After that time, Corp has authority to wind up affairs, including completion of performance of existing contracts. Since the action would be within the Corp's authority, Joe would not be liable for exceeding authority or for ultra vires acts.

4. Yes. Big Shot Owner may satisfy judgment against Corp from Joe to extent of Corp's assets distributed to Joe. After dissolution, the shareholder is still liable to the extent of distributions. Corp could have avoided continued liability by notice to creditors of 180 days to file claim or be barred and publication notice to third parties of 2 yrs. to file claim or be barred.

5. If Corp. wanted to liquidate it could have filed a Notice of Dissolution with the Secretary of State, provided notice to past, existing and subsequent creditors (as described in 4 above), wound up the Corp affairs and filed Cert of Dissolution with the Secretary of State.

2-04 MO Essay 1 - Example 3

1. Big Shot Owner can sue Corporation in the Corporation's name.

In Missouri, a corporation will be held liable for any work it has done while acting in the corporation's name. Thus, even though technically the Secretary of State has dissolved the corporate status, because corporation entered into a contract with Big Shot and performed under the auspices of a corporate identity it will liable on the project.

Corporation will not be able to accept the benefit of the project by virtue of its corporate status and then disclaim liability as a corporation when it chooses.

Similarly, Corporation will be able to sue Big Shot for payment for work done on the project.

A corporation who incurs liability under the corporate name will be able to recoup any money owed to it while doing business.

At issue may also be the possibility that as a director unlawfully entering into contracts Joe may be personally liable for the problems arising out of the contract.

2. Joe is probably liable in his capacity as director.

Where a corporation is winding up (or administratively dissolved as the case is here) a director is personally liable for obligations entered into on behalf of the corporation.

Because Joe entered into this "new business" when he knew the Corporation no longer had legal status to do so he became personally liable for any obligations he took on in the corporate name.

Therefore he will be personally liable for defective work done on the project.

3. Yes – if Joe had rightfully entered into the contract while the corporation still had legal status to do so he would be protected from personal liability. Directors of corporations generally have no personal liability for corporate obligations. This is the advantage of incorporation.

Assuming that Joe had complied with all of the necessary formalities in conducting corporate business (proper meetings, records, separate finances etc.) and behaved in good faith as a director the Corporation would be solely liable.

4. Yes – A corporate creditor may go after assets already distributed by the corporation. Where, as here, the contract was wrongfully entered into and Joe is subject to personal liability as well, a creditor will be allowed to recover for harm done to him in the corporate name.

Joe may not avoid liability by distributing all the corporate assets to himself.

5. In MO, to liquidate, the corporation is required to file a certificate of dissolution with the Secretary of State. There are statutory requirements such as giving actual notice to known creditors and posting general notice as to others that must be complied with. Then the corp can liquidate accordingly to pay debts. Once debts have been paid and assets distributed accordingly, the Secretary will issue a certificate to effectuate dissolution.

Joe should have followed these mechanisms to liquidate the corporate assets.

2-04 MO Essay 2 - Example 1

1) a. The Source may seek **specific performance** of the non-compete clause of the Contract. The Source would have to show: 1) That a legal remedy is inadequate. Legal remedies are inadequate where damages would be speculative or uncertain. Here, it may be every difficult to predict the value of the harm cause by Jack's competition with The Source will be.

2) That the legal remedy is feasible. Specific enforcement of the Contract is feasible if the court has personal jurisdiction over Jack. The court could order Jack not to compete with The Source and it would be fairly simple to ascertain whether Jack was violating the order (if he takes the job with Good Night or not).

3) That there was a valid contract. For contract to be valid, there must have been and offer, an acceptance, consideration and certainty of terms. Here, there are no fact to suggest that the Contract as a whole was not valid and it appears that there is certainty of terms.

However, a **non-compete clause** is the provision at issue here. Non-compete clauses are valid so long as they are **reasonable as to duration and geographical scope**. If unreasonable, a Missouri court may take the "blue pencil" approach and reform the non-compete clause to make it reasonable.

In this case, The Source is a large department store chain (30 stores throughout the Midwest) and the Contract states that Jack may not work at a "competing business" in any city where The Source has a store. The facts do not state whether The Source's stores and Good Night's stores are in the same city, but if they as widespread as it appears, it is possible that Jack could be in violation of the clause in many of the cities in which he would want to work. "Throughout the Midwest" is a large area, which may be held unreasonable. A court may choose to circumscribe the scope, if possible.

The term "competing business" is vague and may be unreasonable. Alternatively, a court may decide that a specialty store is not a competing business against a largue, multi-purpose department store and hold that Jack is not actually competing against The Source.

Duration of this non-compete clause could be as long as nearly 5 years, depending on when Jack leaves The Source. Although there are only 2 years left on he contract in this case, the clause itself could be read as being unreasonably long. Generally, non-competes longer than 2 years are held to be unreasonable, so, this one may not be upheld.

4) That all contractual conditions have been met. The Source must show that it has upheld its end of the bargain and has fulfilled all conditions of the Contract. The Source might run into some trouble with this requirement because Jack will likely argue that The Source failed to fulfill the condition of promoting him to CEO if sales increase during his first 2 years as vice president. However, the Contract contains an integration clause stating that all

agreements of the parties are incorporated into the Contract and, therefore, the statement during negotiation from management that Jack would be made CEO would most likely not be held to be an agreement included in the contract.

5) That there are no defenses which would prevent granting specific performance. As seen below, there appear to be no good defenses for Jack.

If the court is able to "blue pencil" the non-compete clause to make it reasonable in scope, it is likely that the court will rule in favor of spcific performance of the Contract based upon The Source's ability to meet the elements described above.

b. Jack's attorney could use the statement to raise two defenses to enforcement of the non-compete clause. First, as described above, he could argue that the **contractual condition** of making Jack CEO was not fulfilled. However, this defense will likley fail since it does not appear that the the statements management made were actually agreements that are part of the contract.

Second, Jack's attorney could try to make an **"unclean hands"** argument that since The Source did not live up to its alleged promise to make Jack CEO, that they should be prohibited from getting this remedy. However, for this defence, it is necessary that the behavior offend the court and that the offensive behavior be related to the same matter. Here, it is highly unlikely that The Source's behavior would offend the court and thus the court would not accept this defense.

2) Sleeptight may bring a claim for trademark infringement and seek a negative injunction against The Source for it to stop using the "Baby" name and mark. The significance of the customer's attempt to return the "Baby" sleepwear to Sleeptight is that to make a claim from trademark infringment, the plaintiff must show that there is a likelihood of public confusion as the product the trademark is intended to represent. A trademark must be affixed to the product and be used to market the product. Here, the "Baby" trademark was sufficiently confusing to a customer that Sleeptight has strong grounds for its claim.

2-04 MO Essay 2 - Example 2

1. (a)

The Sourcce may seek specific enforcement of the non-compete clause signed by Jack in order to enforce its contract with Jack. The court will not enforce the non-compete by granting a negative injunction preventing Jack from taking a position at a store that only sells specially designed sleeping apparel.

In order to seek equitable relief, the Source must show that a legal remedy would be inadequate, and that an equitable remedy is feasible. Here, a legal remedy is inadequate because damages for lost employees are difficult to measure and speculative. On the other hand, equitable relief is feasible because the court has jurisdiction over Jack, and it is possible to supervise compliance. The Source must also show that no defenses such as unclean hands or laches apply to prevent equitable relief. No such defenses appear to apply in this case.

The Source cannot specifically enforce the employment contract with Jack as a whole in order to force Jack to work for the Source for the remainder of his five-year term. Generally, a contract for services is not specially enforceable because it amounts to involuntary servitude.

On the other hand, the Source can seek enforcement of its non-compete clause. A non-compete clause is enforceable if it is reasonable in its scope, its duration and its geography. Missouri will blue pencil a non-compete clause that contains some invalid provisions, although it will not enforce a non-compete that is patently unconscionable.

In this case, the non-compete Jack signed with the Source prevents Jack from working for any "competing business" in any city in which the Source has a store if Jack leaves during his five-year term. As to duration, it is unclear what is the term of the non-compete. A court probably would blue pencil the provision to remain valid only for the remainder of Jack's five year employment agreement, as this is a reasonable duration and appeared to be the intent of the parties.

As to geography, the court probably will find it reasonable that the non-compete applies only in those cities where the Source already has a store.

As to scope, the Source is a large department store that sells everything from kitchenware to electronics to cosmetics to clothes. Th store Jack is leaving for sells only specially desinged sleepwear. Although the Source might argue that Jack has been instrumental in creating the Baby sleepwear line for the Source, it is also

acknowledged in the industry that these marketing plans become stale every nine to twelve months.

For this reason, the court will probably find that the non-compete is enforceable, and would apply to prevent Jack from working for another general department store in his marketing capacity, but that it does not apply to Jack's position with Good Night stores.

1. (b)

Jack cannot use the Source's statement promising a CEO position as a defense to an attempt to prevent Jaqck from working at a Good Night. A contract for services is interpreted under the common law. Under the common law of contracts, parol evidence may not be introduced to modify or add to a fully integrated agreement. Here, the Contract signed by Jack contains an integration clause stating that all agreements between the parties are integrated into the written contract. We are told that Jack negotiated the contract before signing it. Therefore, assuming the contract is otherwise enforceable, the integration clause will be enforced, and prevent the introduction of contemporaneous agreements on the same subject matter.

Here, Jack might argue that the promise to make Jack a CEO of the company was a separate agreement, and not a contemporaneous promise that should be part of the employment contract. This argument is feasible, as consideration existed on both sides of the exchange: Jack was to be rewarded with a promotion if he showed an increase in sales. However, a court is more likely to find that the agreement related to the same subject matter as his employment contract, and given that it was made on the same day, was intended to be a non-binding promise by the company in anticipation of Jack's strong performance. Therefore, the parol evidence rule will keep this promise out of the contract, and Jack will not be able to raise a defense to the Source's action for specific enforcement of the non-compete clause.

2.

Sleeptight may bring an unfair competition claim against the Source to prevent the Source from marketing its Baby sleepwear in competition with its Baby Baby sleepwear.

Here, we are not told if the Baby Baby sleepwear had federal trademark protection. Sleeptight most likely did not obtain federal trademark protection because generic, descriptive names are not entitled to protection under federal trademark law. (On the other hand, it is possible that the repetition of the word Baby two times made the designation a unique mark.)

Assuming that federal trademark protection does not apply, Sleeptight still may bring a similar state-based claim for unfair competition. State unfair competition law protects businesses from customer confusion or from having their goodwill and branding usurped by third parties. Sleeptight may seek damages by showing that the sale of Baby hurt the sale of Baby Baby sleepwear. Or, Sleeptight may seek a negative injunction preventing the sale of Baby by showing that a legal remedy is inadequate, and equitable relief is feasible.

In this case, a legal remedy may be inadequate if damages are speculative, or because continued sale of Baby would require multiple lawsuits by Sleeptight. Equitable relief is feasible if the court has jurisdiction over the persons or things involved and can supervise compliance with an injunction against the Source. Usually, the court is better equipped to supervise a negative injunction than a mandatory injunction.

Sleeptight's claim of unfair competition requires a showing that is was the senior user of a certain brand, that it has generated goodwill in the brand through use in commerce such that consumers identify the Baby Baby brand with Sleeptight, and that sale of the Baby brand by the Source confuses customers who believe they are buying Baby Baby sleepwear.

A customer's attempt to return the Baby sleepwear to Sleeptight's store is significant because it shows actual confusion among consumers as to the identification of the source of a mark. If Customers are returning Baby sleepwear to Sleeptight, they may be purchasing Baby sleepwear from the Source in the mistaken belief that they are buying the Baby Baby brand.

Given these facts, if Sleeptight files an unfair competition claim, a court will issue a negative injunction prohibiting the Source from marketing the confusingly similar Baby brand.

2-04 MO Essay 2 - Example 3

1.

a. Source should ask for an injunction prohibiting Jack from working for competitors according to their covenant-not-to compete. (In reality, Source is seeking specific performance of a contractual provision.)

The store cannot hold Jack to the contract for personal services. This would be indentured servitude.

However, the store should be able to hold Jack to the covenant-not-to-compete. Missouri law typically allows for specific performance of a covenants-not-to-compete. The remedy at law is inadequate because damages are difficult to determine in such employment situations; the remedy is feasible because the participants are generally subject to personal jurisdiciton of the court. For specific performance, the party must show that there was a valid contract, that all conditions were performed, and that there is a mutuality of remedy.

Under Missouri law, a covenant-not-to-compete will be held as valid if: (1) it is for unique servies; (2) it is reasonable to the extent that the employer needs protection; (3) it is reasonable in both scope and duration. Here, the covenant should be upheld. (1) The contract is for unique services because Jack was hired to create marketing plans for Source. Missouri usually upholds these services as unique. (2) Source has divuldged all of its corporate secrets to Jack and such secrets could be used to exploit Source by its competitors. (3) The covenant is reasonable in duration and scope. Here, Jack has agreed not to work for a competitor for the duration of his 5-year contract (this is only applicable if he leaves prior to expiration of his contract). This is a very reasonable provision. The scope is also reasonable because Source has only 30 stors scattered throughout the Midwest. Further, if the court were to find any of the stipulations to be unreasonable, a court may "blue pencil" the covenant to make it reasonable (note: this is only done when the creator of the covenant has acted in good faith which appears to be the case in this matter).

b. Jack should argue unclean hands and may be granted relief from enforcement of the covenant-not-to-compete.

Jack couldnot argue that the contract was not valid under failure of presupposed conditions (i.e. the promise to make him director) because that is barred under the parole evidence rule. However, parole evidence is not barred to prove an equitable defense.

Injuctions are equitable remedies. Equitable remedies can be granted when the remedy at law in inadequate, the equitable remedy is

feasible, and there are no equiatable defenses. As stated above, Missouri law typically allows for specific performance of a covenants-not-to-compete. However, Jack can claim that Source acted with "unclean hands" which is an equitable defense that could prevent enforcement of the covenant-not-to-compete. Unclean hands is a doctrine applied in equitable situations where the party seeking the equitable remedy acted in bad faith with regard to the transaction in question. The action need not amount to fraud, but it should be enough to offend the court. Here, Source promised Jack that he would become chief executive officer, and that this was crucial to his acceptance of the job. The parole evidence rule does not apply to equitable arguments. Thus, if the court believes Jack, it would likely consider Source to be guilty of unclean hands and refuse to grant the equitable remedy of specific performance of the covenant-not-to-compete.

Jack could also argue that the covenant does not apply to GoodNight because GoodNight only sells sleepwear, and is not a "department store." A covenant-not-to-compete is to protect an employer from reasonable damage. Because the stores are so different in scope (department store v. specialty store), Jack could argue that work with GoodNight would not negatively affect Source.

Of course, Jack would also argue that the scope is too broad because it prevents him from working in 30 midwestern cities. Again, this could be handled by blue pencilling if the court found merit in this argument.

2. Sleeptight should seek an injunction under the claim that Source's use of the tradename "Baby" is infringement because it is confusing to the public with regard to its own trade name "Baby-Baby."

Under Missouri law, tradename infringement is actionable and such use can be enjoined. Here, Sleeptight will show that it had the trade name "Baby-Baby" prior in time to Source's line of "Baby." The facts show that Jack was aware of Sleeptight's use of the tradename for several years. Although imitation is the sincerest form of flattery, and courts are reluctant to impose restrictions on free trade, a court will act where there is a likelihood of public confusion concerning the two brands. Because a customer actually confused the two brands, this is prima facie evidence of confusion. Therefore, a court is likely to grant an injunction and possibly award damage (because of the undisputed proof of confusion).

Source has no equitable defenses to the injunction. Sleeptight has not acted with unclean hands. Further, the facts state that Sleeptight brought the action when it became aware of the infringment,

so laches would not be applicable. (Laches occurs when the plaintiff delays suit and the defendant is prejudiced by the delay.)

2-04 MO Essay 3 - Example 1

1. Bob's administrative remedy. I would advise Bob to file a petition with the appropriate Missouri Public Servie Commission as it appears to be the appropriate administrative agency resonsible for adminstering the telephone utility. At issue are a rate-payer's administrative remedy. As a rate payer, Bob may petition the commission to force the telephone company to change the rate it charges Bob. Bob is entitled to a hearing at which he can present evidence and argue that under Missouri law the telephone company must charge the same rate for customers for the same services and under the same or substantially the same circumstances and conditions. This is not as formal as a court trial, but Bob is entitled to Due Process. Of course, the telephone company is entitled to due process also and is entitled to notice and a fair hearing. Each party may hire its own attorney to represent them, but no one is entitled to appointed counsel.

2. Bob's judicial remedies. Bob may seek judicial review of the adverse administrative decision. At issue are a rate-payer's judicial remedies after an adverse administrative decision. Bob should first exhaust all of the his administrative remedies, such as an administrative appeal. Assuming Bob has exhausted his adminstrative remedies, he may seek judicial review. The typical remedy in this case would be a petition for writ of mandamaus, sometimes called mandate. Bob should invoke the circuit court's original jurisdiction to issue the writ of mandamus, which is available where an administrative agency fails to do an act required by law, or where it abuses its discretion. Here, Bob has a good argument that his rate should be the same of Lazy Days' rate because of the Missouri law mentioned in the facts. The two businesses appear to have the same service under the same or substantially similar circumstances and conditions.

3. Charlie's testimony at the administrative hearing. Yes, Bob can compel Charlies's testimony. At issue are the prodecural due process rights of a rate-payer in an administrative hearing. As mentioned above, Bob is entitled to DUe process at the hearing, both substantive due process and procedural due process. In order to obtain a fair hearing, Bob must be permitted to produce evidence to the commission. The issue of whether Bob can compel Charlie's testimony is an issue of procedural due process. Commissions, such as the Missouri Public Service Commission, have subpoena power. If Charlie is unwilling to appear voluntarily, then Bob must ask the commission is issue an administrative subpoena to compel Charlie's appearance. However, there are limits to the commission's power to issue subpoenas. From the facts, it appears that Charlie is in Anytown, Mo,and not is some far off place beyond the commission's jurisdiction. Assuming that Bob complies with all the requirements for issuance of an administrative

subpoena, which may require paying a witness fee and travel expense, the commission should issue the subpoena. The subpoena must be personally served on Charlie. If the subpoena is properly issued and served, then Charlies's failure to appears may be enforced by the court.

2-04 MO Essay 3 - Example 2

1. Bob wants to seek redress for violation of the state law re: telephone charges. Normally, an action for redress of a state law violation would be brought in a judicial proceeding. However, where a statement grants an administrative agency the authority to regulate a specific area of the law, a party must exhaust their administrative remedies before bringing an action in state courts.

The legislature may grant to administrative agencies rights to enforce a particular law. There is no suggestion that the delegation of authority to MPSC is invalid. Therefore, Bob must appeal to MPSC re: the charges.

Any affected party has the right to appeal an admin. agency. Bob is an affected party because he is being harmed by the fact that he is being charged more than Charley (assuming Bob is the sole proprietor or someone who has standing on behalf of Happy Days to challenge the charge). Bob can petition the MPSC for a hearing on the alleged violation of state law by Anytown Telco.

Upon petition, the MPSC must hold a hearing to determine the validity of Bob's allegations. Bob can likely show that Anytown Telco (AT) is depriving Bob of a property interest in $25.00/mo (the difference between charges to Happy Days and Lazy Days). This deprivation of property is sufficient to get Bob a maximum amount of Constitutional Due Process protection. This means the MPSC will have to deem Bob's petition a request for a trial-type hearing, which MO law refers to as a "contested case." In contested cases, there must be notice of specific charges made to all parties, and all parties have a right to present evidence on their behalf. Parties also have a right to counsel. At the conclusion of the hearing, the MPSC administrators who heard the proceeding must issue a detailed written report of their factual findings and the application of those facts to the law, along with a final order that gives their decision.

2. In the event of an adverse determination by the MPSC, Bob has the right to appeal the agency's decision to the Circuit Court of Cole County, MO. Since a contested case is involved, the circuit court will apply a "substantial evidence" test to the agency's findings of fact, but will apply de novo review to the agency's interpretation of law and ultimate decision. The Circuit Court's decision can be appealed, as well, to the Court of Appeals.

3. Yes. A private party can use an administrative agency's subpoena power to compel third parties to testify on the private party's behalf in an administrative hearing. There are specific rules for determining the procedure required for obtaining an subpoena from an administrative agency, and I believe the differences are based on what kind of evidence is to be produced by the subpoena. However, I recognize that Bob would have to follow any of MPSC's applicable procedures for obtaining a subpoena.

Once Charley is subpoenaed to testify before the MPSC, Bob cannot make Charley actually testify, especially if Charley has some valid defense to testifying. This does not appear to be an issue here. If Charley refuses to testify, he could likely be held in contempt for failure to testify.

2-04 MO Essay 3 - Example 3

1. Filing a claim with Missouri Public Service Commission (MPSC)

Bob is entitled to file a claim with the MPSC because he has a property interest in the money he spends. There is reason to believe that he is being charged additional fees compared to similar customers. Bob can request a hearing and because property is at stake he is entitled to some due process procedures. He can request the MPSC to disclose the reasons for the different prices, which is illegal in Missouri. He should be able to prove with evidence that he is being over charged. If the evidence is in Bob's favor he is entitled to compensation and a reduction.

2. Adverse Determination/Exhaustion

Bob must exhaust all of the available administrative remedies before he can appeal the MPSC's adverse decision to the Circuit Court. Once administrative remedies are exhausted, the Court may decide the evidence based on the substantial evidence test. The Court will determine if the price discrepancies are reasonable in light of the whole record.

3. Administrative agencies have invited subpoena power. To compel a witness to a hearing would require the enforcement by the Circuit Court if not followed. Bob may compel Charlie by properly serving him under administrative authority. Only if Bob fails to show, will the Circuit Court intervene and compel his attendance.

2-04 MO Essay 4 - Example 1

1.

The insurance company may file an action for declaratory relief against Harry to obtain a judgment holding that the exclusion applies and coverage is not afforded to Harry under his policy for Paula's injuries. The insurance company may file this action even though Harry has not filed a motion for impleader claiming that the insurance company is responsible for some or all of Harry's damages owed to Paula.

In an action for declaratory relief, the court has the power to decide whether the insurance contract exclusion applies to deny coverage for injuries caused by lead pollutants. If the court finds the exclusion applies, then Harry will not be able to implead the insurance company into Paula's action or seek indemnification from the insurance company. The court will not rule on whether Harry actually is responsible for Paula's injuries.

2.

Three forms of discovery under the MO Rules of Civil Procedure that will assist my client the Great Insurance Company in filing a motion for summary judgment are depositions, interrogratories and requests to produce evidence (specifically, the release of medical records).

Insurance company may request that party Harry answer interrogatories that set forth his relationship with the insurance company, his acknowledgment of the insurance contract and exclusion, and his personal knowledge of the events leading to Paula's injuries.

Insurance company may request that non-party Paula attend a deposition in order to set forth her personal knowledge of her injuries, including her belief that the injuries were caused during her time painting the walls in Harry's house.

Insurance company may request that Paula release her medical records showing that the cause of her injury was lead based paint. These records would be necessary to establish that lead is indeed the source of Paula's sickness, and hence excluded from Harry's coverage under the pollutant exclusion of his homeowner's policy.

3.

The court will determine that summary judgment is appropriate for my client Great Insurance Company if (a) no material issue of fact remains in dispute, such that based on the undisputed facts, (b) the insurance company is entitled to judgement as a matter of law.

Our motion for summary judgment must set forth all of the undisputed facts with citations to the record, show that every element of our prima facie case of non-liability under the homeowner's insurance policy has been met, and show that Harry cannot meet at least one element of every defense he may have to our case for non-liability under the homeonwer's policy.

4.

The notice of appeal is not timely. A judgment is final 30 days after it is entered by the trial court, or after the court's ruling on the last timely authorized motion (or failure to rule on such motion within 90 days). To be entered, the judgment must be in writing, signed by the judge, denominated "Judgment" or "Decree", and filed by the court.

Assuming that the entry of the judgment by the trial court met this test, and since no authorized motions were timely filed, then the judgment became final 30 days after it was entered by the trial court.

A notice of appeal must be filed with the appeals court no more than 10 days after a judgment becomes final. In this case, the notice of appeal was filed 15 days after the judgment became final, or 45 days after it was entered. Thus, the notice of appeal was not timely. The opponent must seek a special leave to appeal directly with the appellate court instead, and show excusable neglect for its failure to make a timely appeal.

5.

If the trial court had denied both motions for summary judgment, it would be possible to seek appellate relief prior to going to trial on the merits.

It would be possible to seek an interlocutory appeal of the court's denial of both motions for summary judgment. However, the appellate court probably would not entertain this appeal, but would instead wait for the trial court's final decision on the merits. More likely than not, if the trial court denied both motions for summary judgment, material facts remain in dispute and must be resolved at the trial court level prior to any appeal.

It also would be possible to seek a writ of prohibition or a writ of mandamus with the appellate court. In this case, insurance company would seek to compel its interpretation of the exclusionary language of the homeowner's policy. Again, the appellate court is unlikely to grant such relief unless the issue has wider implications beyond these two litigants and the trial court requests such assistance. Instead, the appellate court will await the trial court's final judgment on the merits.

2-04 MO Essay 4 - Example 2

1. The insurance company would ask for a declaratory judgment.

A declaratory judgment is a judgment in which the court determines the rights and obligations of each party when there is not a live controversy before the court. Here, Insurance could ask for a declaratory judgment to determine whether the exclusion applies to the lead poisoning or whether insurance coverage is afforded for such poisoning under the current contract. Missouri law allows for such declararoty judgments.

(NOTE: Such judgments are prohibited in federal courts under the Constitution's requirement for an actual case or controversy.)

2. Unlike federal law, Missouri does not require automatic disclosure of evidence. Three forms of discovery that would assist preparation for summary judgment:

(1) Interrogatories: These are detailed questionaires that are answered under oath. The questions must be answered unless it can be shown that (a) they are not relevant to the current proceedings or (b) they are privileged. Here, Insurance would send interrogatories to both Paula, her doctors, Harry, etc.

(2) Depositions: A deposition is oral testimony taken under oath before a court reported. Depositions may be taken of parties and non-parties, including witnesses and experts. Representation of the deposed is not required. Further, in Missouri, a deposition can be used at trial for any purpose whatsoever to the extent the use is admissible if the party it is used against was (a) present at the deposition, (b) represented at the deposotion, or (c) had notice of the deposition.

(3) Demand for production of documentation: This is a device that is used to produce tangible evidence (rather than testimonial evidence). For example, Insurance could compel the doctor's records for Paula, or Harry's insurance contract.

3. The standard that the court uses in determining summary judgment is, after both the moving party and the non-moving party have responded, that there is no genuine issue of material fact and, viewed in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law.
(a) Plaintiff as moving party must show by appropriate evidence (affidavits and the like):
    (1) that there are no undisputed facts and

(2) that he can prove every element of his prima facie case and that the defendant cannot prove at least one element of each affirmative defense.

(b) Defendant as moving party must show by appropriate evidence (affidavits and the like):

(1) that there are no undisputed facts and

(2) that the plaintiff cannot prove every element of his prima facie case, or in the alternative, that the defendant can prove every element of at least one affirmative defense.

(c) The non-moving party must show that there are disputed facts

4. The notice of appeal is not timely. To be timely, a party must file an appeal within 10 days of the final judgment (unless the time is extended by certain motions). Judgment is final when the decision is written, denoted "judgment" or "decree," signed by the judge and filed. All formalities are assumed to have been completed in this case. Further, no motions have been filed to extend the time for appeal, thus, the appeal is 35 days late.

The facts do not state a special order for late appeal which requires the moving party to show (a) a meritorious defense and (b) a lack of culpable neglect in timely filing. The moving party must petition the appellate court for such an order.

5. A denial of summary judgment is not appealable because it is not a final judgment. It is not a final judgment because the case will go to trial and both sides will have their day in court.

The only relief that can be sought in such a case is to file an extraordinary writ of mandamus or prohibition. A writ of mandamus will compel a judge to act and a writ of prohibition will prevent a judge from acting. Such writs are only granted to prevent manifest injustice. The moving party must show a significant abuse of disretion of the judge. Such writs are not typically granted.

2-04 MO Essay 4 - Example 3

1. Action by insurance company. The insurance company may file an action for declaratory judgment on the insurance contract. At issue is the appropriate remedy where one party to a contract is unsure as to its obligations under the contract. The action for declaratory judgment is not strictly a legal action or strictly an equitable action. Its purpose is to provide a remedy to parties who are unsure of the legal relations between (or among) them. Parties to an insurance contract have a legal relationship which may be the subject of an action for declaratory judgment. The action may involve disputed issues of fact of of law. The court may use a jury for disputed issues of facts, but does not have to. The circuit court has the power to declare the existence,nature,and scope of the legal relationship between Harry (the insured) and Great INs. Co. (the insurer).

2. Discovery. Deposition. A deposition is where an attorney can ask verbal questions of the witness under oath. It is transcribed by a court reporter. The insurer would want to take Paula's deposition to find out the facts of the claim to see if her injury would be covered or excluded. Her deposition may be used to prove facts at the summary judgment motion. Request for Admission. Request for admissions is where the attorney askes the other party to admit the genuineness of documents of admit certain facts. The insurer would want to send a request for admission to Harry in order to get him to admit facts which would be helpful to insuere. Harry's admissions could be used to prove facts on summary judgment. Interrogatories. WRitten interrogatories is where the attorney sends written questions to the adverse party which he must answer under oath, unless the matter is privileged. The insurer would send a request for answers to interrogatories, asking Harry various questions whose answers might help support the motion for summary judgment.

3. Summary judgment standard. A party is entitled to summary judgment where there are no genuine disputed issues of material fact and one party is entitled to judgment as a matter of law. Thus, if there are no disputed issues of material fact, the decision merely turns upon an issue of law which is decided by the court and no jury is needed to decide factual issues.

4. Notice of Appeal. In Missouri, the grant of summary judgment is a final order and may be appealed. The losing party must file a Notice of Appeal in the Circuit Court within 30 days. A notice filed 45 days after the tardy. However, the circuit court has power to grant an extention of time for filing a notice of appeal if made within 6 months of judgment and the errant party shows good cause.

5. Appellate remedy. The denial of both summary judgment motions may not be appealed because the denial of a motion for summary judgment is not a final judgment. Generally, only final judgments may be appealed. THere are exceptions, but none apply here. The party may seek an alternate appellant remedy,such as mandamus. The losing party may invoke the Court of Appeals' orignial jurisdiction to issue the writ of mandamus. Mandamus is an extraordinary remedy and will lie only where the party does not have an adequate remedy at law. Mandamus is discretionary, which means that the Court of Appeals has discretion to permit writ review or summarily deny writ review. Stated alternative, the petitioner has no right to compel the appellate court to consider his petition for writ of mandamus. Here, the petitioner's remedy at law would not be adequate because the legal remedy would be an appeal after judgment. This is not adequate because it forces the petitioner to the expense of a trail where he should not have to try the case if he should have won on summary judgment.